No. 88-400 (2)

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1988

LOCALS 17, 135, 257 and 608 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Petitioners,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

On July 6, 1988, the New York State Court of Appeals upheld the denial by the Supreme Court, New York County (George Roberts, J.), of a motion to quash four grand jury subpoenas served on Locals 17, 135, 257 and 608 of the United Brotherhood of Carpenters and Joiners of America (the "petitioners"). The Court

of Appeals held that those subpoenas do not violate the petitioners' constitutional rights.

STATEMENT OF THE CASE

On December 8, 1986, a New York County Grand Jury began a large-scale investigation into corruption in the carpentry and drywall industry and, in particular, in the Carpenters Union, which has a long history of corruption. That investigation followed the receipt of information from an informant that certain union officials were taking bribes and many months of subsequent court-ordered electronic surveillance. The primary focus of the investigation was the criminal activity of the union's officials. As part of that investigation, on February 17, 1987, four grand jury subpoenas were served on

petitioners. The subpoenas were identical in content -- each requested a list of the members of the local, and their home addresses, telephone numbers and social security numbers.

On March 2, 1987, petitioners moved to quash these subpoenas. An in camera hearing was held on April 2, 1987, before the judge supervising the grand jury. At that hearing, two assistant district attorneys informed the court that the focus of the grand jury investigation was corruption within the union leadership, not within the rank and file membership, and that the membership lists would assist the grand jury in identifying and locating possible witnesses to this corruption.

The prosecutors presented two reasons for subpoenaing the entire membership list of each local. First,

although specific job sites and individuals were the subject of the investigation, limiting the subpoenas to the union members working at those sites or with those individuals would have, in effect, revealed to the targets of the investigation (the officials with custody of the list) the names of the witnesses who would likely be subpoeaned to testify against them in the grand jury. That would raise the specter that the targets might tamper with witnesses.

In addition, while specific job sites and the names of specific individuals had arisen during the investigation, the possible corruption was not limited to those sites and individuals. Furthermore, additional details of the corrupt schemes under investigation were divulged to the hearing court in camera, demonstrating

the need not only for the four complete membership lists but for the social security numbers of the members as well.

At the conclusion of the hearing, the court was satisfied that the state had a compelling interest in issuing the subpoenas, that the subpoenas sought information relevant to the grand jury investigation, and that the subpoenas were neither unduly burdensome nor overbroad. In addition, the court found that the government had made a sufficient showing of "materiality and relevance." The court therefore denied in its entirety petitioners' motion to quash and ordered production of the documents by April 9, 1987. The judge directed petitioners to comply with the subpoenas by turning over these lists to an assistant district attorney who would hold them, prevent them from being

duplicated, and return them to the locals once the investigation had been completed. The hearing court also denied petitioners' application for a stay pending appeal.

On April 6, 1987, petitioners filed a notice of appeal and an application for a stay with the Appellate Division, First Department, of the New York Supreme Court. On April 8, 1987, both parties appeared before a Justice of the Appellate Division who granted an interim stay, explicitly not on the merits, in order to afford a full bench the opportunity to consider the stay application. The People's response to the stay application included a sealed affirmation. On April 16, the Appellate Division denied petitioners' motion for a stay.

Later that day, petitioners filed a notice of appeal from the Appellate Division's order denying the stay and made an application for an interim stay in the Court of Appeals. On April 17, Judge Judith Kaye denied petitioners' motion for a stay. However, Judge Kaye signed an order to show cause why the Court of Appeals should not enter an order staying the hearing court's original order denying the motion to quash, pending the appeal of the Appellate Division order denying a stay. The Court of Appeals thereafter denied an interim stay and ultimately dismissed the appeal from the order of the Appellate Division denying a stay. 69 N.Y.2d 983 (1987). Petitioners then complied with the subpoenas.

In the meantime, on May 21, 1987, the Appellate Division affirmed the

order and judgment of the hearing court denying petitioners' motion to quash.* 130 A.D.2d 987 (1st Dep't 1987). Petitioners then appealed to the New York Court of Appeals, asserting as they did below that the subpoenas violated the First Amendment by having a "chilling effect" on the members' right of free association.**

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*This Court can take judicial notice of the official records of the Supreme Court, New York County, which show that, thus far, the investigation has resulted in the indictment of five union officials for crimes including conspiracy, bribe-receiving, grand larceny, coercion and criminal violations of the Labor Law, and of one other union representative for perjury and criminal contempt. N.Y.Co. Ind. Nos. 7950/87, 7951/87, 7952/87, 7953/87 and 9352/87. The dismissal of one of these indictments is currently being appealed.

**In addition, petitioners argued that the subpoenas violated the Fourth Amendment because they were unduly broad and unreasonable and that union membership lists were privileged from disclosure. They do not raise either of these claims in the instant petition.

On July 6, 1988, the Court of Appeals rejected petitioners' claims and affirmed the decision of the Appellate Division. 72 N.Y.2d 307 (1988). Writing for the majority, Judge Simons, applying the test set forth in Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982), concluded that it is unquestionable that "the State has a compelling interest in preventing and fighting corruption in the construction industry" and that a grand jury investigation is an appropriate means of realizing that interest (Opinion at 4a).* The court went on to find that the four membership lists sought by the grand jury subpoenas bear a substantial relation to the investigation "because they will enable the Grand Jury to locate and

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*Page references followed by "a" are to the Appendices to the Petition.

identify ... potential witnesses for Grand Jury testimony, without unduly burdening or delaying the search and without ... exposing witnesses to possible intimidation." Id.

REASONS FOR DENYING THE WRIT

1. Although petitioners suggest that the Court of Appeals "failed to apply the exacting standard" enunciated in Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 92 (1982), "for justifying First Amendment intrusions" (Petition at 6), in the end, even they retreat from such a claim. Rather, the thrust of their argument is that the court misapplied the Brown test. Because the only question presented is whether the state courts properly concluded that the state satisfied the appropriate standard, there

is no substantial federal question for this Court to review. Nor does the record below support petitioners' related claims that the subpoenas are not substantially related to the grand jury investigation and that they are unnecessarily broad.

To begin, there is no dispute between the parties with respect to the standard for judging whether the state's subpoenas impinge inappropriately on First Amendment interests: First, the interest of the state served by the subpoena must be compelling. Second, there must be some "substantial relation" between that governmental interest and the information required to be disclosed. Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 92 (1982); Buckley v. Valeo, 424 U.S. 1, 64 (1976); Gibson v. Florida Legislative Committee,

372 U.S. 539, 546 (1963); accord In re Grand Jury Proceedings, 776 F.2d 1099, 1102-1103 (2d Cir. 1985) (citing relevant cases).

Petitioners do not now, nor did they below, contest that the state has a compelling interest in pursuing this grand jury investigation. After all, as this Court has made clear, "the investigation of crime by the grand jury implements a fundamental role of securing the safety of the person and property of the citizen" and, as such, is sufficiently compelling to outweigh a First Amendment interest. Branzburg v. Hayes, 408 U.S. 665, 700 (1972).

Moreover, contrary to petitioners' claims, the Court of Appeals correctly found a "substantial relation" between the grand jury's investigation and the membership lists. As Judge

Simons noted, this relation was made clear at the in camera hearing (Opinion at 7a). In addition to this in camera information, the government demonstrated that the membership lists would enable the grand jury to determine the extent of criminal penetration of the locals, to identify the individuals involved, and, most importantly, to locate and identify witnesses. Since petitioners' only complaint pertains to the state courts' assessment of the government's showing and this Court generally defers to the state court's assessment of facts, there is no reason to grant certiorari in this case. Grayson v. Harris, 267 U.S. 352, 358 (1925).

Petitioners, however, are under the misapprehension that the "Court of Appeals failed to require the government to meet this Court's exacting standard,

apparently because the underlying investigation was not directed at union expressive activity" (Petition at 10). They seem to think that because the state courts here did not limit the subpoena as the court did in Local 1814 Int'l Longshoremen's Ass'n v. Waterfront Comm'n, 667 F.2d 265 (2d Cir. 1981), they did not apply the standard at all. That is not true.

In the Waterfront case, the balancing of the governmental interest against the First Amendment intrusion simply yielded a different result on different facts. First, the subpoena in that case called for the names of those union members who contributed to political parties and political action committees. The subpoena thus sought information about members' political expression, and as a result raised fears

of harassment and reprisals. See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); Doe v. Martin, 404 F.Supp. 753 (D.D.C. 1975). But as the New York Court of Appeals sensibly concluded, "the effect subpoenas have on the membership of a union ... is quite different from the effect subpoenas may have on membership in a political group ..." (Opinion at 6a-7a). Second, in Waterfront, unlike here, the information actually needed by the government would inevitably have been obtained from another source without subpoenaing the local (Opinion at 7a). Third, in Waterfront the court ordered that a random selection of names from the union list be provided to the Commission, and that sufficiently served the Commission's purpose. Here, as the

state courts concluded, such a random selection would not suffice. Because of these considerable differences, the Court of Appeals concluded that the intrusion here was less significant, and the state's need greater, than in Waterfront and hence that there was no need for further narrowing of the subpoenas. Id.

The primary concern of the dissenting judges in the Court of Appeals was that the hearing court "failed to indicate whether it had even considered the constitutional claim or balanced the conflicting rights of the Government and the members of the Locals" (Dissenting Opinion at 12a-13a). Of course, there is no requirement that the court make a record of its balancing of competing interests. And here both sides agreed in the hearing court that the issue the court had to resolve was the

constitutional claim, and thus it is inconceivable that the hearing court did not pass on the question. In any event, the Court of Appeals majority specifically addressed the issue, stating that "we have reviewed the record and balanced the competing interests and conclude the [hearing court's] decision was correct" (Opinion at 10a). Notably, even the dissenters would not have reversed the decision of the hearing court based on a determination that the subpoenas violated the members' constitutional rights. Instead, they urged that the matter be remanded to the hearing court so that the court might make a record of what it considered in denying petitioners' motion. The dissent, therefore, does not even state an adequate basis for reversal.

Petitioners also suggest that the Court of Appeals failed "to examine the scope of the subpoenas to ensure they were drawn as narrowly as possible consistent with the government's objectives" (Petition at 16). But the court explicitly addressed that question and concluded that the only other way the grand jury could obtain the necessary information would be "by far more intrusive searches through countless personal records" (Opinion at 7a). The court also concluded "after examining the transcript of the in camera hearing, ... that a random selection of names would not adequately serve the Grand Jury's purpose." Id. Put simply, the court considered the issue of overbreadth and determined that the subpoenas could not be narrowed without undermining or prolonging the grand jury investigation.

Since both prongs of the governing test are satisfied, there is no reason for this Court to explore petitioners' particular assertions about First Amendment injuries. We note, however, that those assertions are specious, and that the subpoenas were narrowly drafted and did not significantly or unnecessarily impact on the members' First Amendment rights. Branzburg v. Hayes, 408 U.S. at 680-81. To begin, the complete membership lists were quite necessary. Contrary to petitioners' assertions, there was no less intrusive way to obtain the information contained in these documents. The subpoenas could not be "abridged," because the targets of the investigation and the worksites involved were limited in number, and an abridged subpoena would have immediately identified potential

witnesses and exposed them to possible threats and influence. Nor would a random selection of names, as had been ordered in Waterfront, have aided the grand jury. After all, because the targets were limited in number, and those who had contact with them made up but a small percentage of the membership, a truncated list might not contain the names of any witnesses, much less all appropriate witnesses.

While petitioners argue that the subpoenas "inevitably cast a chill on Union members' rights" (Petition at 11), they rely merely on conclusory unsubstantiated allegations that complying with the subpoenas would adversely affect union membership and participation in union activites. Since the subpoenas were complied with over a year ago, if their prediction was borne

out it could easily be documented. But, as the Court of Appeals observed, "petitioners have not demonstrated that organizational activity would be curtailed because of the delivery of the lists" (Opinion at 7a).

Petitioners now attempt to claim that the Courts of Appeals imposed upon them the burden "to prove the existence of an actual chill." Instead, petitioners contend, "need only show a 'reasonable probability' that [their] First Amendment rights will be implicated" (Petition at 12). But petitioners have not even satisfied the lesser burden of proof which they contend applies. They have not made a single factual allegation to support their claim of a chill. Their argument is entirely speculative and assumes that the

membership is ashamed that the union is being purged of corruption.

It is far more logical to conclude, however, that the rank and file would applaud such a purge. It is farfetched in the extreme for petitioners to suggest that union members "would give up their union status and corresponding assurance of well paid jobs, simply because the Grand Jury knows they are union members" (Opinion at 7a). Furthermore, this union has had a history of anti-corruption investigations, thus providing a record from which petitioners could demonstrate a "chilling effect," if the union members had in fact ever experienced one. Instead, the record shows that members have not deserted the union before, and there is no reason to think they will now quit a union that guarantees wages of $26

to $27 per hour. Thus, the Court of Appeals was quite accurate in finding that petitioners failed to make the necessary showing.*

In sum, the state courts applied the correct standard in determining whether these subpoenas unnecessarily infringed upon the First Amendment rights of union members. Their conclusion that the government made an adequate showing of compelling need and that the subpoenas had a substantial relation to that need was entirely reasonable and, thus, does not present a "substantial federal question" for this Court's review.

2. The Court of Appeals held that petitioners' appeal was not moot

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*The dissenting opinion suggests that petitioners had no burden at all to show the possibility of a chill. But even petitioners have conceded that they must make some kind of showing.

because the membership lists could be returned and the prosecutor's use of them would cease (Opinion at 3a). Since the question of mootness is itself a federal question, and a jurisdictional one at that, this Court is not bound by the Court of Appeals' ruling. See, e.g., De Funis v. Odegaard, 416 U.S. 312, 316 (1973); Liner v. Jafco, Inc., 375 U.S. 301, 304 (1964). We took the position below, in connection with petitioners' stay application, that an appeal would not be rendered moot after petitioners complied with the subpoenas provided they pursued their appellate avenues expeditiously. Nonetheless, the fact that more than a year has passed since the subpoenas were complied with suggests that this case is moot and thus jurisdiction is lacking. See, e.g., De Funis v. Odegaard, 416 U.S. at 317-319.

3. Petitioners' claim that the Court of Appeals decision "directly conflicts with numerous decisions of this Court" (Petition at 14) is simply wrong. Indeed, the cases petitioners cite in support of their position are readily distinguishable from this case. For instance, Buckley v. Valeo, 424 U.S. 1 (1976), involved a challenge to the Federal Election Campaign Act of 1971, which imposed ceilings on campaign contributions and expenditures. One of the constitutional challenges raised was that the law impinged on the freedom of speech and the right of association by regulating the expenditure of money by campaign organizations. After balancing the government's interest in regulating the amount of money contributed to and spent by political campaigns against the First Amendment implications, the Court

concluded that certain provisions of the law did violate the First Amendment. Of course, the facts in Buckley are decidedly different from the facts of this case. Not only were the constitutional intrusions different but so too was the competing governmental interest. The decision of the Court of Appeals in no way conflicts with this Court's decision in Buckley v. Valeo.

Similarly, there is no conflict here with Branzburg v. Hayes, 408 U.S. 665 (1972), a case in which this Court upheld grand jury subpoenas requiring newspaper reporters to turn over documents and to testify before a grand jury in connection with criminal investigations. As the Court stated, "the heart of the claim" in Branzburg was "that the burden on news gathering resulting from compelling reporters to

disclose confidential information outweighs any public interest in obtaining the information." 408 U.S. at 681. In holding that the reporters were not exempt from grand jury subpoenas, the Court specifically noted the importance of grand jury investigations and that the First Amendment privilege claimed was "conditional." 408 U.S. at 701-702. Not only were the decisions in this case in full accord with the Branzburg decision, but the Court of Appeals explicitly applied the principles of both Buckley and Branzburg.

The petitioners apparently see a "conflict" with these decisions because in each, the Court has stated that government intrusions should not be "unnecessarily broad." See also NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964); Shelton v. Tucker, 364 U.S. 479

(1960). The state courts here never disagreed with or ignored that principle; in fact, as discussed at p. 18, supra, the Court of Appeals considered the issue of overbreadth but simply concluded, as this Court did in Branzburg, that the subpoenas were not unduly broad. The simple fact that the state courts resolved the question against petitioners does not signify a conflict with the decisions of this Court.

In fact, the other courts that have considered general claims of a "chill" on constitutional rights in similar situations have rejected them. For example, in In re Grand Jury Subpoenas (Robert Reade), 88 L.R.R.M. (BNA) 3310 (S.D.N.Y. 1974) (Gurfein, J.), the government subpoenaed the membership lists, home addresses, dates of birth, social security numbers and current

employment status of all past and present members of Local No. 3 of the International Brotherhood of Electrical Workers union. This subpoena, although it requested 40,000 names and was significantly broader than the ones in issue, was upheld over First Amendment objections. The court rejected the "chill argument" and stated, "It can hardly be shown that the union itself would lose dues-paying members." The court further concluded that, "there is neither a showing nor even a likelihood that the production of the membership lists would result in reprisals." See also In re Grand Jury Subpoena Duces Tecum (Local 456), 90 Lab. Cas. (CCH) 12,571 (S.D.N.Y. 1980) (court rejected First Amendment claim and upheld subpoenas of "material reflecting union membership" during investigation of

corruption involving union officials); In re Faltico, 561 F.2d 109, 111 (8th Cir. 1977) (grand jury investigation into racketeering in a particular industry justified subpoena requiring disclosure of membership list of a voluntary association in the industry).

Thus, after applying the appropriate standard it was entirely proper and consistent with precedent for the state courts to decide as they did.

* * *

In sum, the instant petition does not present a "substantial federal question" for this Court's review. Moreover, the decision of the New York Court of Appeals does not "directly conflict" with any decisions of this Court. There is neither reason nor need to grant certiorari in this case to reaffirm the well-established standard

that grand jury subpoenas and other governmental intrusions must meet.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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